## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: June 15, 2010

TO : Alan B. Reichard, Regional Director

Region 32

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: SEIU United Healthcare Workers West

(Windsor Gardens Rehabilitation Center et. al.)

Cases 32-CB-6589, -6590, -6591, -6592 554-1433-1750

554-1467-2410

These cases were submitted for advice as to whether the Union violated Section 8(b)(3) of the Act by failing and refusing to bargain in good faith. We conclude that the charges in the instant cases should be dismissed, absent withdrawal, as there is insufficient evidence that the Union engaged in bad faith bargaining.

## FACTS

Windsor Gardens Rehabilitation Center, Windsor Park Care Center, Windsor Manor Rehabilitation Center, and Windsor Gardens Care Center (the Employers) operate rehabilitation and nursing home facilities in northern California. They are four of the 30 skilled nursing care facilities operated by Windsor Healthcare.

The Employers have had collective bargaining agreements with SEIU United Healthcare Workers West (the Union or UHW) since 2005, when they were acquired by Windsor. Although the Employers have consistently refused to discuss a permissive proposal by the Union to combine the facilities' employees into a single overall bargaining unit, the parties did agree to engage in coordinated bargaining for successor agreements at the Employers' four facilities and four other Windsor facilities.

The parties met for bargaining seven times between April 2008 and September 2008. Employer attorney Josh Sable was the lead negotiator for the Employers, and then-UHW Director of Convalescent Division John Vellardita was the lead for the Union. Wages were the key issue for the Union, and reducing the cost of health insurance was the key issue for the Employers. The Employers requested information from the Union regarding the contracts it had

negotiated with other companies, but the Union failed to provide all of the relevant requested information. 1

The Union held a two day strike on September 24 and 25, 2008, claiming that the Employers were engaged in unfair labor practices. The Union's flyers at the time of the strike claimed that it was fighting for health insurance, wages, retirement plans, and training and education funds.

After the September strike, the parties resumed bargaining. They met eight more times between October 2008 and January 2009. Wages and health insurance continued to be the major issues. At the first post-strike bargaining session on October 27, 2008, the Employers proposed a revised health care plan. At the November 11, 2008, session, Vellardita said that none of the Employers' health plan options were good, and said that he would be able to work out a better deal through Kaiser because SEIU had a special relationship with them.

The November 24, 2008, session was devoted entirely to the Employers' health care proposal. Vellardita said he wanted more time to find another health plan option. In late November 2008, both the Employers and the Union made information requests to each other regarding health plans. The Employers provided the information that the Union had requested on December 3, 2008, and the Union provided some of the information the Employers requested on December 19, 2008. Although the Employers claim that the Union's response was incomplete, there is no evidence that the Employers raised the incompleteness of the Union's response with Vellardita or asked him to provide the rest of the information.

At the December 8, 2008, bargaining session, Vellardita rejected the Employers' health plan proposal and told Sable that he should stop pushing it. Vellardita said that the Employers needed to turn over designing the health plan to him. On December 10, 2008, the parties met again for bargaining and discussed the Union's new proposals dealing with subcontracting and job security. Sable expressed objections, but the parties did not progress on wages or health benefits.

 $<sup>^{1}</sup>$  Region 32 issued a Section 8(b)(3) complaint regarding the Union's failure to provide the requested information in Cases 32-CB-6495 through 32-CB-6498. The hearing in those cases has been postponed pending a decision in these related cases.

On December 16, 2008, the parties met again. The Employers submitted a revised proposal that did not include wages or health benefits, but included a three year contract term, counters to several Union's proposals, and some new proposals. The parties discussed the health plan. Sable said that if the Union could come up with a plan that was cost neutral from the last plan, the Employers would be open to the Union's proposal. Vellardita said that the Union would have a new proposal on health plan by the next session.

On December 19, 2008, the Union submitted two sets of proposals, one on language issues and one offering three packaged options for health insurance and wages. Union's proposals on language issues indicated considerable movement from its earlier proposals. It modified its proposals regarding employee leave for conducting union business. The Union had earlier proposed one paid day a month and up to six months unpaid leave down, but proposed at this session only two weeks of unpaid leave and no paid leave. The Union dropped its proposed prohibition on subcontracting and agreed that subcontractors only needed to follow the terms and conditions of the contract when bargaining work was done, but did not have to offer contractual benefits. The Union also changed its proposed layoff language and its proposal for a two year agreement. In addition, the Union modified its proposed increase in the Employers' contribution to the SEIU pension fund and its proposal that the Employers contribute ten cents per hour worked to an Education Fund, noting that these proposals would be "subject to resolution of other issues."

The Union's proposed packaged options for health insurance and wages included wage adjustments to cover the increased costs to employees of the Employers' different proposed health plan options. The Union's proposal on wages had dropped from initially seeking a \$3.00 to \$4.00/hour increase down to seeking \$2.25 to \$2.70 spread out over the life of the contract.

The parties planned to meet for bargaining on January 6 and 8, 2009, but Vellardita cancelled the meetings in order to have Union representatives and members attend a public meeting dealing with the impending SEIU trusteeship of UHW. On January 7, 2009, Sable called Vellardita and told him he could not evaluate the Union's contract proposal because it was incomplete regarding wages, the contract term, and the health plan. Vellardita said he had received five or so new plans from Kaiser but that he found errors in them and had to review them before giving them to Sable.

On January 9, 2009, Sable called Vellardita again about the health plan. Sable said that the Union would have to agree to the Employers' health plan or identify a new health plan proposal to bring negotiations to a close. Vellardita said he did not have a complete proposal yet but that he would get one to Sable later.

On January 12, 2009, Sable received an email from Vellardita with attached spread sheets presenting an analysis of the cost to the company and to employees of the health plans Sable had proposed in October 2008. Sable emailed Vellardita and asked which option the Union was proposing, because the spreadsheet did not appear to be a proposal.

When the parties met for bargaining on January 13, 2009, Vellardita said the analyzed plans were the ones that Kaiser currently offered, but that he thought he could create a better one. Sable again asked which of the five plans the Union was proposing, and Vellardita could not say. Sable said two of the five seemed to cost no more than the Employers were currently paying for health insurance, so the Employers would be willing to accept one of the two. Vellardita said he could not commit to any one plan. After more discussion about costs of health plans, Sable stated that the Employers were unwilling to assume the Union's estimated 15% cost increase each year of the contract.

On January 14, 2009, Sable told Vellardita that he would pick one of the health plan options and put together a comprehensive proposal since Vellardita could not commit to choosing one health plan. On January 16 and January 21, 2009, Sable sent Vellardita emails with complete proposals on all of the non-economic items and all of the economic items.

On January 27, 2009, SEIU put UHW in trusteeship. Assistant SEIU Trustee Lisa Gude asked the Employers to send all copies of previous proposals because the previous union leadership had destroyed all the files when they left. Sable sent everything to Gude in an email.

The first bargaining session after the imposition of the trusteeship was scheduled for February 6. After Gude unsuccessfully tried to get the bargaining committee to join her in negotiations, she told Sable that they would have to cancel that day's meeting, as she could not bargain without members being present. Thereafter, the parties met without incident, and they have since reached agreement on new collective-bargaining agreements.

## ACTION

We conclude that the charges in the instant cases should be dismissed, absent withdrawal, as there is insufficient evidence that the Union engaged in bad faith bargaining.

Section 8(b)(3) of the Act provides that a Union violates the Act when it refuses to collectively bargain with the employer of the employees it represents. Section 8(b)(3) must be read in conjunction with Section 8(d), which expressly defines the bargaining obligation to include a requirement to meet at reasonable times and confer in good faith. The statutory duty to bargain "encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring." Thus, the Board has stated that a party in collective bargaining must "display a degree of diligence and promptness in arranging for the elimination of obstacles thereto comparable to that which he would display in his other business affairs of importance."

In the instant cases, we conclude that the Union's conduct is insufficient to establish bad faith bargaining. The parties met for 15 bargaining sessions between April 2008 and January 2009<sup>4</sup> and, although there were no tentative agreements reached, both parties presented many proposals and showed significant movement during this period of time. The Union modified its proposals regarding wages, subcontracting, layoffs, pension and education fund contributions, employee leave for conducting union business, and the term of the agreement. While the Union may have delayed presenting the health insurance proposal it had promised, and eventually only presented the same proposal that the Employers had earlier offered, this conduct is insufficient to establish bad faith bargaining. This is particularly true where the Union appears to have

<sup>2</sup> Storer Communications, 294 NLRB 1056, 1095 (1989), quoting
J. H. Rutter-Rex Mfg. Co., 86 NLRB 470, 506 (1949).

<sup>3</sup> Barclay Caterers, 308 NLRB 1025, 1035 (1992), quoting Rutter-Rex, 86 NLRB at 506.

<sup>&</sup>lt;sup>4</sup> Cf., <u>Caribe Staple Co.</u>, 313 NLRB 877, 893 (1994) (insufficient time devoted to bargaining where, "[d]uring the first 13 months ... [employer's bargaining representative] made four trips . . . for purposes of collective bargaining"); <u>Barclay Caterers</u>, 308 NLRB at 1037 (four sessions in nine months for a total of eight hours, and a subsequent cancelled meeting, together with one month delay for the final meeting, insufficient).

presented the same proposal because it was not able to negotiate a better health plan from Kaiser.

Further, the Union's cancellation of the early January bargaining meetings and the post-trusteeship February 6 meeting do not establish an intent to delay negotiations or to bargain in bad-faith. Indeed, the post-trusteeship cancellation was due to circumstances largely beyond the Union's control. And, given the several months of productive bargaining, the cancellation of the January and February meetings were isolated events that do not rise to the level of bad faith bargaining. In any case, the parties subsequently bargained without incident, and, most significantly, reached agreement on a new collective-bargaining agreement. Therefore, in all these circumstances, we conclude that there is insufficient evidence that the Union engaged in bad faith bargaining.

Accordingly, the Region should dismiss the charges in the instant cases, absent withdrawal.

B.J.K.